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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MATTHEW SAMMARTINE, Plaintiff and Appellant, v. NCWC DEALER SERVICES, INC., Defendant and Respondent.	B285797 (Los Angeles County Super. Ct. No. BC587650)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Jay S. Rothman & Associates and Kenneth R. Myers, for Plaintiff and Appellant.

Kolar & Associates, Elizabeth L. Kolar and Benjamin T. Runge, for Defendant and Respondent.

Matthew Sammartine, a former employee of NCWC Dealer Services, Inc., appeals from the judgment entered after the trial court granted summary judgment in favor of NCWC in Sammartine's action for disability discrimination, wrongful termination and related employment claims. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Sammartine's Employment at NCWC*

NCWC is a telemarketing company that sells aftermarket automobile warranties. Sammartine began working in NCWC's customer service department in October 2012. Sammartine left NCWC after a few months but returned in November 2013 to work in the verification department. The record contains only sparse information regarding Sammartine's job duties, but it appears he mainly answered telephone calls from customers or vendors. In his declaration submitted in opposition to summary judgment, Sammartine stated his job "involved a lot of repetitive motion using the mouse, keyboard and telephone."

While Sammartine was employed by NCWC, employees were required to "punch" in and out on an electronic timekeeping system at the beginning and end of each shift, as well as when they left and returned from a lunch break. If an employee forgot to punch in or out, or punched in or out at a time other than when he or she actually began or ended work, the employee was expected to fill out a "missed punch form" explaining the correction needed. The form stated, "Failure to clock in and/or out & clocking in and/or out earlier/later than your scheduled time is subject to disciplinary action for not complying with company policy." Sammartine stated in his declaration his understanding was he should submit a missed punch form, "if I

ever thought I might have missed a punch, to err on the side of caution. I did this, filling out the missed punch forms probably on occasions when I had punched it but was not 100% sure, later in the day, that I had done so." During the 18 months he worked in the verification department, Sammartine submitted 13 missed punch forms.

NCWC utilizes a progressive discipline policy for tardiness and unexcused absences. Upon the first instance of tardiness or absence, an employee receives an oral warning. If a second infraction occurs within five weeks of the first, the employee receives a written warning. A third infraction within five weeks of the second infraction results in a second written warning and one-day suspension. A fourth infraction within five weeks of the prior incident results in a third written warning and a one-week suspension or termination. In the 12 months prior to his termination Sammartine received at least four oral warnings, four written warnings and one second written warning accompanied by a one-day suspension.

2. *Sammartine's Pain and Request for Time Off*

At some point in 2014 Sammartine began experiencing pain in his arm, wrist and hand. He believed the pain was related to his work because it increased while he was in the office and diminished when he was home. Sammartine complained numerous times to his supervisor, Chad Keith, about the pain; Keith suggested Sammartine squeeze a stress ball to alleviate the tension. The pain continued to worsen. Eventually Sammartine lost some range of motion in his fingers and worried he might have permanent nerve damage. In April 2015 Sammartine informed Keith he "was experiencing discomfort and pain and I was worried about it and I was going to make an appointment for

the doctor." Sammartine testified at his deposition he did not describe his symptoms to Keith in any detail but "simply [said] that I was experiencing pain and discomfort." Keith responded by reminding Sammartine to submit the applicable time-off request forms for any doctor's appointment.

Sammartine scheduled a doctor's appointment for April 30, 2015. On April 27 or 28 Sammartine submitted a leave request form to Pamela Williams, who at the time was the assistant general manager for NCWC. Under the section "Reason for Time Away" on the form, Sammartine wrote, "Dr. Appt." Sammartine testified that, when he gave the form to Williams, he told her the doctor's appointment was due to "pain in my right hand and arm." Williams denied the request on the day it had been submitted because Keith already had an absence scheduled for April 30. Williams explained in her declaration it was NCWC policy that only one employee in the verification department could be out of the office on the same day. Thus, Sammartine's request for leave was automatically denied. Sammartine did not tell Williams his appointment was urgent or explain the medical issue to her except to say he was experiencing pain.

Other than the described exchanges with Keith and Williams, Sammartine did not tell anyone in NCWC's management about his pain or any other symptoms he was experiencing.

Due to the severity of his pain, Sammartine decided to keep his April 30, 2015 doctor's appointment despite having been denied permission to be absent from work. He did not communicate to anyone at NCWC that he would be attending the doctor's appointment or would be arriving late to work.

According to Sammartine, his doctor told him during his April 30 visit that he had nerve damage and the nerves in his hand or arm were not responding properly. The doctor recommended Sammartine refrain from working for one week, but Sammartine reportedly refused to miss work because "I knew [NCWC] needed me there because [Keith] was out, so I told [the doctor] I wanted to keep working for now." The doctor gave Sammartine a note for his employer. The note was not submitted to the trial court, but in his declaration Sammartine reported the note "excus[ed] my absence that morning as medical leave and also indicat[ed] that I needed the accommodation of an ergonomic keyboard and mouse, and my injury was due to not having the ergonomic keyboard and mouse."[1]

3. *NCWC's Termination of Sammartine's Employment*

Jeremy Fox, NCWC's general manager, testified at his deposition that he was informed in February or March 2015 that two of the four employees in the verification department felt Sammartine "was not holding up to his fair share of the team's work." Those employees had previously complained to Fox about Sammartine at least three times and on additional occasions to Williams. In response to the complaints in February or March 2015, Fox reviewed Sammartine's performance statistics. Fox testified the statistics showed the number of telephone calls

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[1] Sammartine's deposition testimony similarly characterized the note's contents: "What the note stated, to the best of my recollection, was that based on OSHA standards, I was required to have [an] ergonomic—ergonomically correct keyboard and mouse and that I was not being provided that and as a result I was injured and that they need to provide me that in order to prevent further injury."

Sammartine answered per day, how long he spent on each call, the percentage of "talk time" for each team member and how many calls were missed by the department. The data showed other members of the verification department answered many more telephone calls than Sammartine. Fox concluded, "it was pretty clear that [Sammartine] did less production." Fox directed Keith to speak to Sammartine about his performance.

Fox also testified he and Williams spoke to Sammartine directly regarding performance issues in early 2015. The two supervisors expressed concern to Sammartine regarding his many missed punch forms, lack of production, complaints from other employees about Sammartine's performance and his requests for numerous days off. Fox explained the small size of the verification department meant a large drop in production if even one team member was absent; and he told Sammartine that, if necessary, he could move to the sales department where his absences would be less impactful.

On April 30, 2015 Fox and Williams met at 7:00 a.m. for a routine daily status meeting. The conversation turned to Sammartine's performance issues, including his absences, the complaints from coworkers and his missed punch cards. Fox testified that, after that conversation, "it was a pretty easy decision, based on every single thing . . . like, this makes no sense for us to keep him employed." Fox testified it was solely his decision to terminate Sammartine's employment.

After Sammartine failed to arrive for his 9:00 a.m. shift, Williams informed Fox the verification department employees were complaining of Sammartine's absence. Fox responded, "It's not a problem. I've already made the decision to terminate him." Fox informed the employees in the human resources department

upon their arrival, around 9:30 a.m., that Sammartine was being terminated and requested Sammartine's final paycheck.

Sammartine arrived at work at approximately 11:00 a.m. on April 30, 2015. He testified he gave Williams the note from his doctor requesting an ergonomic keyboard. Williams recalled Sammartine saying he had been at a doctor's appointment, but she did not remember receiving the note. She chastised Sammartine for being absent without notice despite having been denied leave to go to the doctor that morning. Approximately one hour after Sammartine arrived, Fox notified him that his employment was being terminated.

4. *Sammartine's Complaint*

On July 10, 2015 Sammartine filed a complaint naming NCWC as defendant and asserting eight causes of action: (1) violation of the California Family Rights Act (CFRA) (Gov. Code, § 12945.1 et seq.);[2] (2) disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (§ 12900 et seq.); (3) failure to provide reasonable accommodation in violation of FEHA; (4) failure to engage in the interactive process in violation of FEHA; (5) failure to take all reasonable steps to prevent discrimination in violation of FEHA; (6) retaliation in violation of FEHA, CFRA and common law; (7) wrongful termination in violation of public policy; and (8) intentional infliction of emotional distress. The complaint alleged, "In terminating plaintiff, defendant was motivated by plaintiff's disability (carpal tunnel syndrome); by fear that plaintiff would

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[2] Statutory references are to this code unless otherwise stated.

make a workers' compensation claim; and by retaliation for plaintiff taking medical leave to see a doctor."

5. *NCWC's Motion for Summary Judgment/Summary Adjudication*

On November 18, 2016 NCWC moved for summary judgment or, in the alternative, summary adjudication. NCWC argued Sammartine's FEHA and CFRA claims failed because NCWC did not have knowledge of Sammartine's alleged disability or serious health condition at the time it made the decision to terminate his employment. NCWC also asserted, even if it had knowledge of Sammartine's disability, it had a legitimate, nondiscriminatory reason for terminating his employment and had not failed to accommodate Sammartine or to engage in the interactive process. Finally, NCWC argued Sammartine's common law wrongful termination and intentional infliction of emotional distress claims failed because they were premised on the same conduct as the FEHA and CFRA claims.

In support of its arguments NCWC submitted copies of Sammartine's 13 missed punch forms, five written warnings and 10 leave request forms. NCWC also provided a copy of an "Employee Incident Report" stating Sammartine's employment was being terminated because he "is not a team player, he does not hold up his end of the workload." The date and time of the incident report were identified as April 30, 2015 at 9:00 a.m. NCWC also relied on declarations from Fox and Williams stating the decision to dismiss Sammartine had been made prior to his arrival at work on April 30, 2015.

6. *Sammartine's Opposition to the Summary Judgment Motion*

In opposition to the motion Sammartine argued triable issues of material fact existed as to whether NCWC knew of his disability prior to making the decision to terminate his employment. Sammartine also argued NCWC's purported nondiscriminatory reasons for firing him were pretextual. As evidence Sammartine cited the timing of his termination—the same day he took time off to see a doctor and requested accommodations. He also asserted in a supporting declaration that he was a high performing employee and had been offered a raise by Fox one month before his discharge.[3]

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[3] Sammartine also submitted excerpts from the rough draft transcripts of Fox's and Williams' depositions, which were taken after NCWC moved for summary judgment. NCWC objected that consideration of the rough draft transcripts violated Code of Civil Procedure section 2025.540, subdivision (b). However, NCWC subsequently waived its objection to the use of rough draft transcripts in exchange for the opportunity to file a supplemental reply brief. This agreement was memorialized in the court's April 24, 2017 minute order and recited in an April 28, 2017 declaration from NCWC's counsel. In what appears to have been an oversight, the court stated in its order granting summary judgment that it could not consider the rough draft transcripts submitted by Sammartine. Regardless, the court found Sammartine had not demonstrated a disputed issue of material fact even if the rough draft transcripts were considered.

On appeal Sammartine argues the court's mistake in excluding the rough draft transcripts was reversible error. The argument is moot. Not only did the court ultimately consider the transcripts and find summary judgment was nevertheless

7. *Summary Judgment for NCWC*

The trial court granted summary judgment in favor of NCWC, concluding the undisputed evidence showed the decision to terminate Sammartine's employment was made before he arrived at work on April 30, 2015 and before he informed his supervisors of any disability or need for accommodation. In addition, the court found NCWC had demonstrated a legitimate, nondiscriminatory reason for the termination and Sammartine had not presented evidence that the proffered reason was a pretext for unlawful discrimination.[4]

DISCUSSION

1. *Standard of Review*

A motion for summary judgment or summary adjudication is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) We review a grant of summary judgment or summary adjudication de novo (*Samara v. Matar* (2018) 5 Cal.5th 322, 338) and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party or a determination a cause of action has no merit as a matter of law. (*Hartford*

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warranted, but also many of the same excerpts were submitted, without objection, by NCWC with its supplemental reply brief.

[4] In addition to granting NCWC's motion for summary judgment, the trial court separately granted the motion for summary adjudication as to each of Sammartine's eight causes of action.

Casualty Ins. Co. v. Swift Distribution, Inc. (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc*. (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

When a defendant moves for summary judgment in a situation in which the plaintiff at trial would have the burden of proof by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to "'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; see Code Civ. Proc., § 437c, subd. (p)(2).) """"The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish,"' the elements of his or her cause of action."""" (*Ennabe v. Manosa*, *supra*, 58 Cal.4th at p. 705; accord, *Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 720; *Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1002-1003 ["the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence'"].)

Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (Code Civ.

Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) On appeal from an order granting summary judgment, "the reviewing court must examine the evidence de novo and *should draw reasonable inferences* in favor of the nonmoving party." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470; accord, *Aguilar*, at p. 843.) "[S]ummary judgment cannot be granted when the facts are susceptible to more than one reasonable inference . . . ." (*Rosas v. BASF Corp*. (2015) 236 Cal.App.4th 1378, 1392.)

2. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's FEHA Claim for Discrimination*

a. Governing law

FEHA prohibits an employer from, among other things, discharging a person from employment because of a physical disability. (§ 12940, subd. (a).) The express purposes of FEHA are "to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (§ 12920.5.) The Legislature accordingly has mandated that the provisions of the statute "shall be construed liberally" to accomplish its purposes. (§ 12993, subd. (a).) As the Supreme Court has recognized, "[b]ecause the FEHA is remedial legislation, which declares '[t]he opportunity to seek, obtain and hold employment without discrimination' to be a civil right [citation], and expresses a legislative policy that it is necessary to protect and safeguard that right [citation], the court must construe the FEHA broadly, not . . . restrictively." (*Robinson v. Fair Employment & Housing Com*. (1992) 2 Cal.4th 226, 243.)

Physical disability under FEHA includes "[h]aving any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that" both affects one or more of the body's major systems and "[l]imits a major life activity." (§ 12926, subd. (m)(1).) Major life activity is "broadly construed" and includes working. (*Id.*, subd. (m)(1)(B)(iii).) FEHA protects individuals not only from discrimination based on an existing physical disability, but also from discrimination based on a potential disability or the employer's perception that the individual has an existing or potential disability. (§§ 12926, subd. (m)(4), (5), 12926.1, subd. (b).)

To establish a prima facie case for unlawful discrimination, a plaintiff must provide evidence that "(1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought or was performing competently in the position he [or she] held, (3) he [or she] suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

Discriminatory intent is a necessary element of a discrimination claim. (See § 12940, subd. (a); *Guz, supra,* 24 Cal.4th at p. 355; *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 590 (*Soria*); *Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1370 [plaintiff's claim based on a disparate treatment theory "requires a showing that the employer acted with discriminatory intent"]; see also *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662.) In addition, "there must be a causal link between the employer's consideration of a protected characteristic

and the action taken by the employer." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215 (*Harris*).) To "more effectively ensure[] that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision," a plaintiff must demonstrate "discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor." (*Id.* at p. 232; see *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550-551 ["proof of discriminatory animus does not end the analysis of a discrimination claim. There must also be evidence of a causal relationship between the animus and the adverse employment action"].) As part of showing that discriminatory animus was a substantial cause of the adverse employment action, an employee must establish that the employer had knowledge of the employee's protected characteristic (here, Sammartine's disability). (*Soria*, at pp. 590-591; see *Avila v. Continental Airlines*, *Inc.* (2008) 165 Cal.App.4th 1237, 1247 (*Avila*) ["'[a]n adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer'"].)

A plaintiff may prove his or her discrimination case by direct or circumstantial evidence or both. (*Soria, supra,* 5 Cal.App.5th at p. 591; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) Because direct evidence of intentional discrimination is rare and most discrimination claims must usually be proved circumstantially, in FEHA employment cases California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]. (*Guz, supra*, 24 Cal.4th at pp. 356-357; see *Harris*, *supra*, 56 Cal.4th at p. 214.) "[A] plaintiff has the

initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris,* at pp. 214-215; see *Guz*, at pp. 354-356.)

An employer moving for summary judgment on a FEHA cause of action may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case "is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038; see *Guz*, *supra*, 24 Cal.4th at pp. 356-357; *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1181.) Once the employer sets forth a nondiscriminatory reason for the decision, the burden shifts to the plaintiff to produce "'substantial responsive evidence' that the employer's showing was untrue or pretextual." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735; accord, *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156; see also *Guz,* at p. 357.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions,

the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz,* at p. 361; see also *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098 [if a defendant employer's motion for summary judgment "relies in whole or in part on a showing of nondiscriminatory reasons for the [adverse employment action], the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the [adverse action]. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred"].)

b. Sammartine failed to establish a triable issue of material fact whether NCWC had knowledge of his disability at the time of his discharge

NCWC does not challenge Sammartine's evidence that he had a disability, was generally qualified for his position or suffered an adverse employment action. However, it argued in the trial court Sammartine could not establish it was more likely than not his disability was a substantial motivating factor of his discharge because the undisputed evidence showed the individuals who made the decision to fire Sammartine were not aware of his disability or his request for accommodation. "[A]n employer 'knows an employee has a disability when the employee tells the employer about his [or her] condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those

facts." (*Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 887; see *Avila*, *supra*, 165 Cal.App.4th at p. 1248 [all that is required is that the plaintiff show the "employees who decided to discharge him knew of his disability"].) "'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]."'" (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 (*Featherstone*).)

Both Fox and Williams testified they met early on the morning of April 30, 2015 and discussed terminating Sammartine's employment. While Williams provided input, the final decision was made by Fox. Fox testified he made the decision immediately after his meeting with Williams—before he knew Sammartine would be late to work that day and before he knew Sammartine had a disability or required an accommodation. In fact, Sammartine failed to present any evidence, direct or circumstantial, that Fox ever saw the doctor's note Sammartine presented to Williams. Williams also testified she was unaware of Sammartine's disability at the time Fox made the decision to fire Sammartine. In support NCWC submitted the employee incident form documenting Sammartine's termination, which was dated April 30, 2015 at 9:00 a.m., two hours before Sammartine arrived and requested accommodation.

Sammartine disputes NCWC's position concerning the timing of Fox's decision to discharge him, contending it was not

made until after he had requested the ergonomic keyboard and mouse. Sammartine has provided no evidence to support this contention other than his own speculation. For example, Sammartine argues Fox's version of events is "implausible" because Fox did not send an e-mail to human resources requesting a final paycheck for Sammartine until approximately 12:30 p.m., more than an hour after Sammartine had arrived and presented his doctor's note to Williams. However, Fox explained he had orally informed human resources of the termination earlier that morning (before Sammartine arrived at the office), but human resources did not request written notification until shortly after noon. Sammartine has cited no evidence contradicting Fox's testimony, simply asserting Fox is lying. Such speculation is insufficient to raise a triable issue of fact. (See *Dollinger DeAnza Associates v. Chicago Title Ins. Co*. (2011) 199 Cal.App.4th 1132, 1144-1145 ["a party 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact'"]; *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1371 ["bare assertion of the existence of credibility issues was insufficient to create a triable issue of fact"]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1118 ["[s]peculation is insufficient. [Citation.] 'The plaintiff must produce evidence which permits an inference of illegal intentional discrimination'"].)

Furthermore, even if the decision to terminate Sammartine's employment was made after he arrived at work on April 30, 2015, Sammartine failed to present evidence he had provided adequate notice to Fox or Williams that he was suffering from a FEHA-qualifying disability. Sammartine

testified that, at the time he initially requested time off for his doctor's appointment, he only told Williams the appointment was due to pain in his arm. That statement was insufficient to put Williams on notice Sammartine was suffering from a physical disability. (See *Avila*, *supra,* 165 Cal.App.4th at p. 1249 [statement plaintiff had been hospitalized for an unspecified condition was not sufficient to put employer on notice plaintiff suffered from disability]; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 348 ["[p]ain alone does not always constitute or establish a disability"]; *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 237 [employer's knowledge plaintiff "had taken a substantial amount of leave for medical appointments" insufficient to establish employer's knowledge of disability].) Likewise, as described by Sammartine, the note from his doctor merely stated Sammartine had an unspecified injury and needed an ergonomic keyboard and mouse. The note did not contain a diagnosis or prognosis, nor did it state Sammartine was unable to work or could only work under certain conditions. Williams could reasonably have interpreted the requirement of ergonomic equipment to be due to a temporary injury, as preventive in nature or simply a doctor's assertion of best practices. Because the fact of a disability was not the only reasonable interpretation of the known facts, we cannot impute knowledge of the disability to Williams or NCWC. (*Brundage*, at p. 237; accord, *Featherstone, supra,* 10 Cal.App.5th at p. 1168.) Sammartine has not presented any evidence of additional statements to either Fox or Williams regarding his disability such that their knowledge of his condition could reasonably be inferred.[5]

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[5] Although Sammartine made additional statements to Keith, it is undisputed Keith took no part in the decision to

c. Sammartine has failed to establish a triable issue of material fact whether NCWC's nondiscriminatory reason for termination was pretextual

Even if the decision to terminate Sammartine's employment was made after NCWC had notice of his disability, Sammartine failed to demonstrate a triable issue of material fact whether NCWC's proffered legitimate, nondiscriminatory reason for termination was pretextual.

Generally in cases involving affirmative adverse employment actions, pretext may be demonstrated by showing "'the proffered reason had no basis in fact, the proffered reason did not actually motivate the discharge, or, the proffered reason was insufficient to motivate discharge.'" (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224; see also *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [pretext may be shown by "'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons"'"].) However, simply showing the employer was lying, without some evidence of discriminatory motive, is not enough to infer discriminatory animus. "The pertinent [FEHA] statutes do not prohibit lying,

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terminate Sammartine and was not in the office on the day of Sammartine's discharge. There is no evidence Keith ever informed Williams or Fox about his conversations with Sammartine regarding the disability. Thus, any knowledge by Keith of Sammartine's disability is immaterial. (See *Avila*, *supra*, 165 Cal.App.4th at p. 1250.)

they prohibit discrimination." (*Guz, supra,* 24 Cal.4th at p. 361; see also *Slatkin v. University of Redlands, supra,* 88 Cal.App.4th at p. 1156.) "'Pretext may also be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before the termination.'" (*California Fair Employment & Housing Com. v. Gemini Aluminum Corp*. (2004) 122 Cal.App.4th 1004, 1023.) To demonstrate pretext, circumstantial evidence "'"must be 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate" on an improper basis.'" (*Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 834; accord, *Husman v. Toyota Motor Credit Corp.*, *supra*, 12 Cal.App.5th at p. 1182.)

In support of its contention Sammartine was discharged as a result of poor performance, NCWC relied on the written notice of termination presented to Sammartine on April 30, 2015, which stated he was being terminated for "lack of production." Similarly, the employee incident report signed by Fox on April 30, 2015 stated Sammartine was being terminated because he was not a team player and did not "hold up his end of the workload." Fox also testified he decided to terminate Sammartine's employment due to his performance statistics, complaints from coworkers and his "abundance of missed punch forms" and "numerous days off."

Sammartine does not dispute he had submitted 13 missed punch forms in the 18 months he was employed in the verification department. Nor does he dispute that, in the 12 months prior to his termination, he had received four oral warnings, four written warnings and a one-day suspension as a

result of tardiness and attendance issues. Instead, Sammartine argues the missed punch forms and attendance issues could not have been the reason for his termination because he had not submitted a missed punch form or had any attendance-related discipline in the months leading up to his termination. This assertion misstates the undisputed evidence, which shows Sammartine received a one-day suspension for tardiness just five weeks before his termination.

Sammartine attempts to minimize the contribution those attendance-related issues may have had on his termination by stating in his opening brief, "[T]here is actually no testimony whatsoever stating that any of those [attendance or missed punch form] issues were a factor in Sammartine's termination." Again, Sammartine's description of the record is simply incorrect. Fox testified that during his meeting with Williams on April 30, 2015, after which he decided to discharge Sammartine, Fox and Williams discussed Sammartine's "missed time, the fact that I don't know if he's going to show up to work or not. I don't know if—when he shows up if he's going to leave early or if he's going to come back from lunch late. I have so many times, he said, 'Oh, I forgot to clock in,' we've given him the benefit of the doubt. Then you pile on representatives that are saying that he's not working as hard. Representatives are saying he's been told—I've heard him be told, and he still doesn't seem to get it. And for us—for me—it was a pretty easy decision, based on every single thing that you have lined up against them was, like, this makes no sense for us to keep him employed." This testimony unequivocally established Sammartine's attendance issues were a substantial motivating factor in the termination decision. Sammartine has failed to present any competent evidence to the

contrary that would suggest the proffered justification was pretextual.

Sammartine also contends there exists a triable issue of material fact as to pretext because he had been performing well prior to his termination. In his declaration Sammartine stated Keith had "look[ed] up the productivity of the people in my department on the computer system, and ranking us on number of calls received, handled, call time, etc., and I recall specifically that I was second overall." However, there is no indication as to when Keith viewed those statistics or as to which performance metrics in particular Sammartine ranked "second overall." On the other hand, Fox testified he reviewed the verification department's performance statistics shortly before Sammartine's termination and concluded Sammartine answered significantly fewer telephone calls than his coworkers and overall "did less production." Sammartine also contends he was offered a promotion one month prior to his termination, evidencing a disputed issue of fact as to the quality of his performance. Specifically, Sammartine stated Fox "offered me a raise and promotion to take additional responsibility and earn commissions . . . ." That testimony is not insistent with NCWC's position that Sammartine was terminated because of his performance issues. in light of Fox's testimony he offered to let Sammartine transfer to the sales department where his absences would be less disruptive.

In sum, Sammartine has failed to offer specific, substantial evidence that would permit a finding the legitimate, nondiscriminatory reasons for his firing advanced by NCWC were pretextual and that intentional discrimination was the true cause for his termination. (See *Batarse v. Service Employees Internat.*

Union, Local 1000, *supra,* 209 Cal.App.4th at p. 834.) The mix of vague circumstantial evidence, subjective interpretation and inference and surmise offered by Sammartine failed to raise a triable issue that NCWC had acted with discriminatory animus. (See *Guz*, *supra*, 24 Cal.4th at p. 361 ["an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory"]; *Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1062 [assertion witness was lying without supporting evidence was insufficient to defeat summary judgment]; *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433 ["plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations"].)

3. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's FEHA Claim for Failure To Provide Reasonable Accommodation*

In addition to prohibiting disability discrimination, FEHA provides an independent cause of action for an employer's failure "to make reasonable accommodation for the known physical or mental disability of an applicant or employee" unless the accommodation would cause "undue hardship" to the employer. (§ 12940, subd. (m).) Once an employer is aware of a disability, it has an "affirmative duty" to make reasonable accommodations for the employee. (Cal. Code Regs., tit. 2, § 11068, subd. (a).)

"Generally, '"[t]he employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations."'" (*Raine v. City of*

Burbank (2006) 135 Cal.App.4th 1215, 1222.) An employee is not required to specifically invoke the protections of FEHA or speak any "magic words" in order to effectively request an accommodation under the statute. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954; see also *Avila, supra*, 165 Cal.App.4th at p. 1252 ["no particular form of request is required"].) However, ""[t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is 'aware of respondent's disability and physical limitations.'"" (*Avila,* at p. 1252; accord, *Featherstone, supra,* 10 Cal.App.5th at p. 1167 ["'unless there is some evidence an employer knows an employee is suffering from a disability, it is impossible for an employee to claim . . . that an employer refused to accommodate the disability'"].) The employee must engage in the interactive process and ""can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it."" (*Avila*, at pp. 1252-1253.)

As discussed, Sammartine's statements to Williams regarding the pain in his arm and his request for leave for a doctor's appointment were not sufficient to put NCWC on notice he suffered a disability covered by FEHA. Likewise, his general statements to Keith that he had ongoing pain in his arm were not sufficient to make Keith aware Sammartine had a physical disability and may need accommodation. (See *Arteaga v. Brink's, Inc., supra,* 163 Cal.App.4th at p. 348.) Moreover, even if Sammartine's request for an ergonomic keyboard were considered sufficient to put NCWC on notice Sammartine was requesting an accommodation for a physical disability, the undisputed evidence established NCWC had already made the decision to terminate

Sammartine's employment at the time the accommodation was requested. Sammartine has cited no authority supporting the proposition that an employer must reconsider a legitimate, nondiscriminatory termination if an employee subsequently requests an accommodation for a physical disability. Accordingly, the trial court properly granted NCWC's motion as it related to Sammartine's FEHA claim for failure to accommodate.

4. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's FEHA Claim for Failure To Engage in the Interactive Process*

Under section 12940, subdivision (n), it is separately actionable for an employer to fail "to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition." (§ 12940, subd. (n); see *Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 54.) "'The "interactive process" required by the FEHA is an informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively.'" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1013.) Both the employer and the employee are responsible for participating in the interactive process. Unless the disability and resulting limitations are open and obvious, "'the initial burden rests primarily upon the employee . . . to specifically identify the disabilisty and resulting limitations, and to suggest the reasonable accommodations.'" (*Ibid.*)

As discussed, Sammartine failed to establish a disputed issue of material fact as to whether he had identified his disability and resulting limitations to NCWC. Accordingly, the trial court properly granted NCWC's motion as to Sammartine's interactive process claim.

5. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's FEHA Claim for Failure To Prevent Unlawful Discrimination*

Under section 12940, subdivision (k), it is unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." If a plaintiff "cannot establish a claim for discrimination, the employer as a matter of law cannot be held responsible for failing to prevent same: "'[T]here's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen . . . .'"" (*Featherstone*, *supra*, 10 Cal.App.5th at p. 1166; see *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1317 [finding of actionable harassment was required for plaintiff to prevail on claim based on failure to prevent harassment].)

Because Sammartine cannot establish his underlying cause of action for disability discrimination, he cannot maintain a derivative claim for failure to prevent discrimination. (See *Featherstone*, *supra*, 10 Cal.App.5th at p. 1166.)

6. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's CFRA Claim*

CFRA "'is intended to give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security.'" (*Soria, supra,*

5 Cal.App.5th at p. 600; accord, *Faust v. California Portland Cement Co.*, *supra*, 150 Cal.App.4th at p. 878.) CFRA makes it unlawful for an employer of 50 or more persons "to refuse to grant a request by an employee" for family care and medical leave and "to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right" provided by CFRA. (§ 12945.2, subds. (a), (t).) It is also an unlawful employment practice to discharge or discriminate against any individual because of his or her exercise of the right to family care or medical leave as provided by CFRA. (§ 12945.2, subd. (*l*)(1).) Grounds for leave include "an employee's own serious health condition" when that condition "makes the employee unable to perform the functions of the position of that employee." (§ 12945.2, subd. (c)(3)(C).) CFRA defines a "[s]erious health condition" as "an illness, injury, impairment, or physical or mental condition that involves either of the following: [¶] (A) Inpatient care in a hospital, hospice, or residential health care facility. [¶] (B) Continuing treatment or continuing supervision by a health care provider." (§ 12945.2, subd. (c)(8).) "Inpatient care" means "a stay in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity." (Cal. Code Regs., tit. 2, § 11087, subd. (r)(1).) "Continuing treatment" means "ongoing medical treatment or supervision by a health care provider . . . ." (*Id.*, subd. (r)(3).)

"The elements of a cause of action for retaliation in violation of CFRA are: '"(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or

suspension, because of her exercise of her right to CFRA [leave].'" [Citation.] Similar to causes of action under FEHA, the *McDonnell Douglas* burden shifting analysis applies to retaliation claims under CFRA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248; accord, *Soria, supra*, 5 Cal.App.5th at p. 604.)

NCWC has argued Sammartine cannot establish a CFRA retaliation claim because he was terminated for a legitimate, nondiscriminatory reason and not because of a request for CFRA leave.[6] For the reasons discussed, NCWC was entitled to summary adjudication on this claim. Sammartine failed to present evidence raising a disputed issue of material fact as to whether NCWC's purported reason for discharging Sammartine was pretextual. (See *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 614 [summary adjudication of CFRA claim appropriate when employee failed to raise triable issue of fact regarding pretext].)

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[6] Sammartine's complaint arguably stated separate causes of action for violation of CFRA under a retaliation theory and an interference theory. NCWC's motion for summary judgment addressed only the retaliation theory, as did the trial court's order granting the motion. However, Sammartine did not argue in the trial court that summary adjudication could not be granted on a CFRA interference theory, nor has he made that argument on appeal. Accordingly, Sammartine has forfeited any argument a CFRA claim based on interference survives. (See, e.g., *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief issue "constitutes a waiver or abandonment of the issue on appeal"]; *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452 ["point not raised in opening brief will not be considered"].)

7. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's Retaliation Claim*

"'"To establish a prima facie case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two.'" [Citations.] 'The retaliatory motive is "proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter." [Citation.] "The causal link may be established by an inference derived from circumstantial evidence, 'such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.'" [Citation.]' [Citation.] 'Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.'" (*Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at pp. 69-70; accord, *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386, 388.)

As discussed, Sammartine has not presented evidence NCWC was aware of any protected activities on his part or of any causal link between protected activity and his termination. Accordingly, the trial court properly granted NCWC's motion on the retaliation cause of action.

8. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's Claim for Wrongful Termination*

Sammartine's cause of action for wrongful termination in violation of public policy is grounded in his contentions he was terminated because of his alleged disability and request for accommodation. As discussed, Sammartine failed to establish a triable issue of material fact as to whether NCWC discriminated against him. NCWC's motion on the wrongful termination cause of action was properly granted.

9. *The Trial Court Properly Granted Summary Adjudication as to Sammartine's Claim for Intentional Infliction of Emotional Distress*

"'The elements of the tort of intentional infliction of emotional distress are: "'(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." [Citation.] The defendant must have engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result."'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; accord, *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050; *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 945.) "Whether behavior is extreme and outrageous is a legal determination to be made by the court, in the first instance." (*Faunce v. Cate* (2013) 222 Cal.App.4th

166, 172; accord, *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 87; *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.)

Sammartine's complaint alleges NCWC's denial of his request for time off to see a doctor and its allegedly retaliatory termination were outrageous conduct. Not only has Sammartine failed to establish any wrongdoing on NCWC's part, but also NCWC's actions were not so extreme as to exceed the bounds of what is tolerated in a civilized community. NCWC's motion was properly granted on this cause of action.

DISPOSITION

The judgment is affirmed. NCWC is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.